APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK DATED MAY 8, 2003

COURT OF APPEALS OF NEW YORK

CIBC MELLON TRUST COMPANY, as Trustee of Chrysler Canada, Ltd.'s Benefits Plan and Others, et al.,

Respondents,

v.

MORA HOTEL CORPORATION N.V. et al.,

Appellants.

May 8, 2003

READ, J.

Defendants here appeal from an order of the Appellate Division, which, among other things, affirmed Supreme Court's order and judgment recognizing and docketing certain judgments entered against them by the English High Court of Justice, Chancery Division, pursuant to New York's version of the Uniform Foreign Country Money-Judgments Recognition Act (CPLR Article 53). For the reasons that follow, we conclude that the English judgments at issue satisfy the statutory prerequisites for recognition.

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I.

In 1992, Castor Holdings Ltd., a Canadian real estate and financial investment company, declared bankruptcy. Plaintiffs CIBC Mellon Trust Company, as trustee of several pension and other benefit funds, and Daimler Chrysler Canada, Inc. had lost millions of dollars in investments in Castor. In May 1996, plaintiffs commenced legal proceedings in England in the High Court, alleging that they had been duped into making these investments by what amounted to a massive, multinational fraud. The suit named Wolfgang Otto Stolzenberg, the president, CEO and chairman of Castor, as the primary defendant accused of masterminding the fraud.

Marco Gambazzi, a Swiss attorney, was also individually named as a defendant. Gambazzi owned, in whole or in part, and controlled Mora Hotel Corporation N.V. and Chascona N.V.,[1] which were among the numerous corporations eventually named as defendants in the English proceedings. Plaintiffs initially asserted only a "tracing" claim against Mora for receipt of funds for no consideration, which were traceable to the alleged fraud. When plaintiffs added a claim of conspiracy against Mora in January 1999, they joined Chascona as a coconspirator.

Mora is the ground lessee and operator of the Gorham Hotel, located in midtown Manhattan, and Chascona is the fee owner of the property. They are both Netherlands Antilles corporations authorized to do business in New York. The Gorham Hotel is apparently their sole asset.

1. Gambazzi had also served as a director of Castor, a managing director of Castor's principal lending subsidiaries and an officer or director of a number of other Castor subsidiaries.

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Plaintiffs made two kinds of ex parte applications to the High Court. The first sought leave to serve various nonresident defendants, including Mora (and later, Chascona), as "necessary or proper" parties. This rule (*see* Rules 6.20; 6.21 of Civil Procedure Rules [of England]) allows out-of-the-jurisdiction service on such a party when the liability of the defendants, either jointly or individually, depends upon a single investigation (*see Massey v Heynes*, 21 Q.B.D. 330 [CA 1888]). In order for the High Court to exercise such "necessary or proper" jurisdiction, however, at least one defendant — in this instance, Stolzenberg — must be an English domiciliary and serve as the base or anchor defendant (*see* Rules 6.20; 6.21). The second kind of ex parte application sought *Mareva* injunctions or orders (*see Mareva Compania Naviera S.A. v International Bulkcarriers S.A.*, 2 Lloyd's Rep 509 [1975]) to freeze defendants' assets on a world-wide basis during the pendency of the English proceedings and to direct certain discovery. The initial *Mareva* order required Mora to provide information and documents relating to the tracing claim and its assets as well as copies of any documents relevant to the proceedings. In support of this application, plaintiffs submitted attorney affidavits and voluminous supporting documentation. After reviewing these materials over nine days, the High Court determined that plaintiffs had made the requisite showing; namely, a "good arguable case."

In March 1997, plaintiffs served Mora in New York with a writ of summons and the *Mareva* order. Mora appeared in the English proceedings for the limited purpose of contesting the High Court's jurisdiction over Stolzenberg, the anchor defendant, on the grounds that he was not domiciled in

England at the time that Mora argued was critical (i.e., when the writ of summons for Stolzenberg was served rather than when it was issued). In May 1997, the High Court rejected Mora's argument and dismissed its application to set aside service of the writ on it; and the Court of Appeal dismissed Mora's appeal in October 1997. Finally, in October 2000, the House of Lords dismissed Mora's appeal from the Court of Appeal. Chascona abandoned its identical jurisdictional challenge following the House of Lords' dismissal of Mora's appeal.

While disputing the High Court's jurisdiction, Mora elected not to comply with the *Mareva* order relating to the tracing claim and several subsequent orders to secure compliance with it. Some of these orders were "unless" orders, which explicitly warned Mora that continued recalcitrance would lead to its debarment or preclusion from defending against the tracing claim and permit plaintiffs to obtain judgment. When Mora failed to take heed, a default judgment was entered against it for roughly $600,000 (U.S.) in February 1999, following a damages assessment hearing.

In July 1999, plaintiffs applied ex parte to increase to $420 million (Can.) the value of Mora's assets covered by the *Mareva* order, and to grant the same freezing relief with respect to Chascona on account of the conspiracy claims pending against them both. Once again, before granting plaintiffs' applications, the High Court examined the evidence to determine whether plaintiffs had established the requisite "good, arguable case."

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Thereafter, as a result of their failure to comply with the new *Mareva* and concomitant "unless" orders, both Mora and Chascona were debarred from defending against the main fraudulent conspiracy claims. Plaintiffs applied to the High Court for an assessment of damages, and a hearing was held. In December 1999, default judgments of roughly $330 million (U.S.) were entered in England against both Mora and Chascona on the conspiracy claims.

In May 2000, plaintiffs commenced an action in Supreme Court, seeking recognition of the English judgments pursuant to the Uniform Foreign Country Money-Judgments Recognition Act (CPLR article 53) and New York common law, as well as an attachment of the Gorham Hotel, reportedly worth approximately $30 million. On January 16, 2001, Supreme Court granted plaintiffs summary judgment recognizing and docketing the English judgments; confirmed the attachment; appointed a post-judgment receiver to manage and sell the Gorham Hotel in satisfaction of the English judgments; and denied defendants' cross motion to dismiss the complaint.

The Appellate Division affirmed Supreme Court's order and judgment on May 28, 2002 (296 AD2d 81 [2002]). This appeal pursuant to CPLR 5601(b)(1) followed. The constitutional issues asserted as a basis for our jurisdiction on the appeal are, broadly stated, whether the courts below violated defendants' due process rights by (1) determining that the English courts properly exercised personal jurisdiction over them; and (2) recognizing foreign judgments that were entered on default following defendants' failure to comply with a provisional remedy (the *Mareva* orders) not available in New York.

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Subsequent to Supreme Court's decision and order, defendants in 2001 and 2002 applied to the High Court to set aside the default judgments entered against them because of their failure to comply with the "unless" orders, and to allow them to defend the tracing and conspiracy claims on the merits. After a six-day hearing, which took place from December 9-16, 2002, the High Court dismissed defendants' applications on February 3, 2003. Plaintiffs then moved to dismiss this appeal, arguing that defendants' applications to the High Court mooted the asserted constitutional bases. We withheld decision and entertained oral argument on both the motion and the appeal.

II.

New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts (*see e.g. Lazier v Westcott*, 26 NY 146 [1862]; *Dunstan v Higgins*, 138 N.Y. 70 [1893]; *Cowans v Ticonderoga Pulp & Paper Co.*, 246 NY 603 [1927]; *see also Greschler v Greschler*, 51 NY2d 368, 376 [1980]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5301:1, at 540); and in 1970, New York adopted the Unif. Foreign Money-Judgments Recognition Act (*see* Uniform Foreign Money-Judgments Recognition Act §§ 1-9, 13 ULA 43-80; L 1970, ch 981, §§ 1-2)[2] as CPLR article 53. Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments

2. Twenty-nine other states and the District of Columbia have adopted variations of the Uniform Act.

would receive streamlined enforcement here (*see* Judicial Conference Mem in Support, Bill Jacket, L 1970, ch 981, at 4 [reference to pagination of document]; Kulzer, *The Uniform Foreign Money-Judgments Recognition Act*, 13th Ann Jud Conf Rep, 194, 195-196, 226 [1968]).[3]

Article 53 applies to "any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal" (CPLR 5302). Simply put, a foreign country judgment is considered "conclusive between the parties to the extent that it grants or denies recovery of a sum of money" (CPLR 5303) unless

> 1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; [or]
>
> 2. the foreign court did not have personal jurisdiction over the defendant (CPLR 5304[a][1], [2]).

Moreover, "[i]n proceeding under article 53, the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment" (*Lenchyshyn v Pelko Elec.*, 281 AD2d 42, 49 [4th Dept 2001]).

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3. *See also* Kulzer, *Recognition of Foreign Country Judgments in New York: The Uniform Foreign Money-Judgment Act*, 18 Buf L Rev 1 (1968).

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On this appeal, defendants direct their principal fire related to CPLR 5304(a)(1) at the High Court's use of *Mareva* orders. While we have expressed concern regarding the power and potential commercial disruption of *Mareva* orders (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 550-551 [2000]), the use of this device, standing alone, does not render the English *system* as a whole incompatible with our notions of due process (*see, e.g. Guinness PLC v Ward*, 955 F2d 875, 900 [4th Cir 1992]). In short, CPLR 5304(a)(1) does not demand that the foreign tribunal's procedures exactly match those of New York. Rather, the statute is satisfied if the foreign court's procedures are "compatible with the requirements of due process of law" (*id.* at 882). Moreover, "[c]onsidering that our own jurisprudence is based on England's, a defendant sued on an English judgment will rarely be in a position to defeat it with such a showing" (Siegel, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5304:1, 2003 Supp Pamph, at 65; *see also Society of Lloyd's v Ashenden*, 233 F3d 473, 476 [7th Cir 2000] ["Any suggestion that [England's] system of courts 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible"]).

In summary, the relevant inquiry under CPLR 5304(a)(1) is the overall fairness of England's legal "system," which is beyond dispute (*see Society of Lloyd's v Grace*, 278 AD2d 169 [1st Dept 2000]; *Society of Lloyd's v Ashenden*, *supra*; *compare Bridgeway Corp. v Citibank*, 201 F3d 134 [2d Cir 2000] [fairness of Liberian courts]). Indeed, defendants were given ample notice and numerous opportunities to present their defense in England; they simply elected to forego these

opportunities (apparently against the advice of their English attorneys) for strategic reasons.

Turning next to CPLR 5304(a)(2), the question is whether the English courts had jurisdiction over defendants. Before reaching this question, however, we must consider the merits of plaintiffs' motion to dismiss. Plaintiffs argue that when defendants applied to the High Court, seeking relief from the English judgments and the opportunity to defend on the merits, they "voluntarily appeared in the proceedings" within the meaning of CPLR 5305(a)(2), thus mooting this appeal. While such a voluntary appearance would not, in our view, moot the appeal, it would abrogate the reviewability of defendants' argument that the English judgments are unenforceable in New York because the English courts lacked jurisdiction over them.

Section 5305(a)(2) provides in relevant part that a foreign judgment shall not be denied recognition for lack of personal jurisdiction if "the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure * * * or of contesting the jurisdiction of the court over him" (CPLR 5305[a][2]). Plaintiffs contend that defendants' application to the High Court does not fall within either exception, particularly the second; i.e., it was not an appearance "for the purpose * * * of contesting * * * jurisdiction * * * over [them]."

The commentary for CPLR 5305(a)(2) explains that this second exception is restricted to an

> "appearance * * * solely to protest jurisdiction, what New York used to call and some places still

call a "special appearance". *If the judgment debtor did any more than she had to do, however, to preserve her jurisdictional objection in the foreign court, she would thereby have submitted voluntarily to its jurisdiction and forfeited the right to claim an exception for herself under this paragraph*" (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 5305:1, at 555-556 [emphasis supplied]).

Federal courts applying New York law have, in fact, interpreted CPLR 5305(a)(2) to foreclose a defendant from contesting a foreign judgment for lack of personal jurisdiction once the defendant has done anything more than it had to do to preserve its jurisdictional objection (*see S.C. Chimexim S.A. v Velco Enters., Ltd.*, 36 F Supp 2d 206, 215 [SDNY 1999]; *Nippon Emo-Trans Co. Ltd. v Emo-Trans Inc.*, 744 F Supp. 1215, 1222-1226 [EDNY 1990]).

In *S.C. Chimexim S.A.*, a Romanian plaintiff sued an American corporate defendant with its principal place of business in New York for an alleged breach of contract in Romania. The defendant failed to appear and the Romanian tribunal, thereafter, entered judgment for approximately $200,000. The defendant appealed from the Romanian judgment, raising multiple grounds going to both the merits and personal jurisdiction. In the federal action to enforce the Romanian judgment, the court held that the defendant had made a voluntary appearance pursuant to CPLR 5305(a)(2) and was, thus, precluded from contesting personal jurisdiction (*S.C. Chimexim S.A.* at 215).

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In *Nippon Emo-Trans Co., Ltd.*, a Japanese judgment creditor sought an order confirming attachment of a New York company's assets in order to satisfy the judgment it had obtained against the company in Japan. The court determined that the New York company's appearance in the Japanese action to defend on the merits after losing its jurisdictional challenge was a voluntary appearance within the meaning of CPLR 5305(a)(2) (*Nippon Emo-Trans Co. Ltd.* at 1222-1226).

The *Nippon* court reasoned that the traditional conceptual differences between "general" and "special" appearances prevailing at the time CPLR article 53 was adopted formed the "conceptual underpinnings" of section 5305(a)(2) (*id.* at 1224-1225). The court also relied upon a section of the Restatement of the Conflict of Laws, which states that "[a] general appearance is one where the defendant either enters an appearance in an action without limiting the purpose for which he appears or where he asks for relief which the court may give only if it has jurisdiction over him" (*id.* quoting Restatement [Second] of Conflict of Laws § 33, Comment d). Included in this category are those instances where a defendant "makes a motion raising a question as to the merits of the plaintiff's claim even though the defendant shows that he does not intend thereby to submit himself to the jurisdiction of the court" (*id.*).

While New York no longer distinguishes between a general and special appearance (*see* CPLR 320), we agree with the *Nippon* court that the language and structure of CPLR 5305(a)(2) have retained the traditional distinction for purposes of recognition actions. Accordingly, the pertinent question here is whether defendants' applications to the High Court amounted to a voluntary appearance within the meaning of CPLR 5305(a)(2).

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The "skeletal argument" submitted by defendants on their applications to set aside the English judgments and the High Court's decision leave no room for doubt that defendants were arguing the merits of the conspiracy claims in the English proceedings. They made arguments and presented proof in an attempt to persuade the High Court that their reasons for disobeying the *Mareva* and "unless" orders were reasonable. Significantly, "[c]onsiderable time was spent, on the hearing of the Applications, on the issue of the legal merits of the claims against Mora and Chascona" (*CIBC Mellon Trust Co. v Stolzenberg*, 2003 WL 117093 at ¶ 46). Exploration of the legal merits of the conspiracy claims in particular "took up much of the hearing" (*id.* at ¶ 66).[4] Defendants did not preserve any objection to the High Court's jurisdiction over them for purposes of this recognition proceeding. Indeed, they went so far at oral argument as to suggest that if they had successfully vacated the English judgments and unsuccessfully defended on the merits, they still could have contested personal jurisdiction in a future New York recognition proceeding.

We disagree. When defendants applied to the High Court to set aside the English judgments and to defend on the merits, they did more than they had to do to preserve a jurisdictional objection — which was, in any event, foreclosed to them in

4. The High Court Judge, The Honourable Mr. Justice Etherton, remarked on both the volume of materials submitted and the length of the proceedings: "There were more than sixty lever-arch files [binders] placed before me, for the purposes of the Applications. The hearing before me lasted six days, and undoubtedly would have lasted considerably longer" had defendants' counsel not had another engagement and if the court had allowed plaintiffs to continue in proving the merits of their conspiracy claims (*CIBC Mellon Trust Co. v Stolzenberg*, *supra* at ¶ 79).

England by the House of Lords' decision — and so they voluntarily appeared in the foreign proceeding within the meaning of CPLR 5305(a)(2).

We note that CPLR 5305(a)(2) does not on its face distinguish between voluntary appearances taking place in the foreign proceeding before or after judgment; and the two Federal cases discussed above each involved post-judgment appearances by the judgment-debtors. The Restatement of the Conflict of Laws likewise makes no pre- or post-judgment distinction, stating that a defendant may be deemed to have made an appearance in an action and, therefore, to have submitted to a court's jurisdiction, by, among other things, "taking steps in the action *after judgment either in the trial court or in an appellate court*" (Restatement [Second] of Conflict of Laws, § 33, Comment b [emphasis supplied]; *see* Restatement [Third] of Foreign Relations Law, § 421[3] [stating that "[a] defense of lack of jurisdiction is generally waived by any appearance * * * if the appearance is for a purpose that does not include a challenge to the exercise of jurisdiction"]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * *

Order affirmed, with costs. Opinion by Judge Read. Judges Smith, Ciparick, Wesley, Rosenblatt and Graffeo concur. Chief Judge Kaye took no part.

Decided May 8, 2003

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT DATED MAY 28, 2002

SUPREME COURT, APPELLATE DIVISION,
FIRST DEPARTMENT, NEW YORK

CIBC MELLON TRUST COMPANY, etc., et al.,

Plaintiffs-Respondents,

v.

MORA HOTEL CORPORATION N.V., et al.,

Defendants-Appellants.

May 28, 2002.

SAXE, J.

This appeal requires this Court to consider what circumstances are sufficient to grant recognition and enforcement of a money judgment issued by an English court, where the defendants are Netherlands corporations doing business in New York that maintained no presence in England and appeared only for the purpose of contesting personal jurisdiction.

FACTS

The legal claims that form the basis for the judgments at issue here relate to the financial collapse of Castor Holdings Ltd., a Canadian real estate and financial investment company

that declared bankruptcy in 1992. Plaintiff CIBC Mellon Trust Company, acting as the trustee of several trust funds, and plaintiff DaimlerChrysler Canada Inc. both invested, and lost, millions of dollars in Castor Holdings investments. They commenced legal proceedings in the English High Court of Justice, Chancery Division, alleging that they had been defrauded into these investments in what amounted to a massive, multinational fraud. Named as primary defendant in the English proceeding was Wolfgang Otto Stolzenberg, the president, chief executive officer and chairman of Castor Holdings, who is alleged to have orchestrated the fraud.[1]

In addition to three other individual defendants named in the English proceeding, plaintiffs ultimately named 47 corporate defendants, including the two defendants in the present proceeding, Mora Hotel Corporation N.V. ("Mora") and Chascona N.V. ("Chascona"). Mora is the ground lessee and operator of the Hotel Gorham, located at 136 West 55th Street in Manhattan, and Chascona is the fee owner of the property; they are both Netherlands Antilles corporations authorized to do business in New York. One of the named individual defendants in the English action, Marco Gambazzi, is a Swiss attorney who owns and controls defendants Chascona and Mora Hotel Corporation; he also served as a director of Castor Holdings and managing director of Castor's principal lending subsidiaries, CH International Finance NV, as well as serving as officer or director of a number of other Castor subsidiaries.

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1. Indeed, in April 2000, Stolzenberg was indicted in Canada for 41 counts of fraud relating to Castor's collapse.

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When the action was commenced in England in 1996, the claims were initially made against a total of 37 defendants, including defendant Mora Hotel Corporation. However, while the claims against Stolzenberg, Gambazzi, the other two individual defendants, and Castor Holdings and its subsidiaries were, from the outset, based upon a claim of a fraudulent conspiracy, the claim as against Mora Hotel was initially much more limited. Plaintiffs merely interposed a "tracing" claim, analogous to a claim for a constructive trust, in which they alleged that Mora had received funds for no consideration that could be traced to investments made by plaintiffs based upon the alleged fraud by Castor, which claims amounted to (Can.) $195,653, (Can.) $151,610 and (US) $51,662.

When plaintiffs amended their claim in 1999, following receipt of certain discovery, defendant Chascona N.V. was added as a defendant, and the claims against it as well as new claims against Mora encompassed the overall fraud as well as tracing claims. The damages then sought against them, like those against Stolzenberg and the other defendants, were over $300 million.

English Court Procedures

To commence the English proceeding, plaintiffs made two ex parte applications to the English High Court in June of 1996. One sought leave to serve various non-resident defendants, some of whom, including Mora, were sought as

necessary or proper parties,[2] some as citizens of signatories to the Lugano Convention.[3] The second application sought ex parte injunctive relief, termed a "Mareva" injunction, by which the defendants' assets would be frozen during the pendency of the proceedings and certain discovery directed.

The basis of the assertion of jurisdiction by the English High Court over Mora, and later over Chascona, namely, that they were "necessary or proper parties," is founded upon an English practice rule (*see*, Rules of the Supreme Court of England Order 11 Rule 1[1][c]). This rule permits the court to grant a plaintiff leave to serve process on out-of-jurisdiction defendants in a multi-defendant case as long as one "base" or "anchor" defendant is a domiciliary of England, and the out-of-jurisdiction defendants are either necessary or proper parties. A "proper" party is one who, had he been in the country, could have been joined as a proper party to the proceeding (*see*, Dicey & Morris, The Conflict of Laws [13th ed.], at 316); a "necessary" party is "any person . . . whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon" (*see*, RSC

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2. The decision of the motion court referred to the Lugano Convention instead of "necessary or proper party" jurisdiction as the basis of the English court's assertion of jurisdiction over these defendants; we discuss the basis upon which the English court actually asserted jurisdiction.

3. The Lugano Convention provides for the enforcement of judgments between member states of the European Economic Community and the European Free Trade Association, the latter of which includes Austria, Finland, Iceland, Norway, Sweden and Switzerland.

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Order 15 rule 6[2]; *Barings PLC [in Administration] v Coopers & Lybrand*, English High Court of Justice, Chancery Division, August 2, 1996, Chadwick, J. [unreported]).

In support of their two ex parte applications, plaintiffs submitted attorney affidavits and voluminous supporting documentation, which the court reviewed over a period of nine days. The court determined that plaintiffs had made the requisite showing, namely, a "good, arguable case" for the claims against the defendants.

A Writ of Summons was initially issued August 1, 1996, and leave of court to make Mora a defendant was granted on February 26, 1997. In March of 1997, Mora was served in New York with the Writ and a Mareva order, restraining it from transferring assets and directing certain disclosure. Mora and its owner, Gambazzi, thereupon retained English counsel and appeared for the limited purpose of disputing the court's exercise of personal jurisdiction over them.

In an effort to protect their rights to subsequently challenge the English court's exercise of jurisdiction over them, defendants avoided raising issues that would address the merits of the substantive claims against them, and so did not challenge the determination of the English court that they were necessary or proper parties. Rather, their jurisdictional challenge was limited to the propriety of the assertion of jurisdiction over the base defendant, Stolzenberg, on the ground that he was no longer domiciled in England at the time plaintiffs attempted to serve him with the Writ of Summons.

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Their jurisdictional challenge to the propriety of service was denied in the English High Court. In its ruling, the court acknowledged that although there was evidence that Stolzenberg was domiciled at a London address when the writ was issued on August 1, 1996, he sold that property on August 19, 1996, prior to delivery of process to that location. Nevertheless, it concluded that jurisdiction over the moving defendants was proper. In October of 1997, defendants challenge to this order was rejected, and the order affirmed, in a 48-page opinion. Another appeal ensued, and on October 12, 2000, the House of Lords unanimously affirmed the lower courts, reasoning that jurisdiction over the anchor defendant was proper even if service could not be effectuated on the base defendant until a later date, as long as that defendant was domiciled in England on the date of issuance of the writ. It rejected the suggestion that "necessary or proper party" jurisdiction over out-of-jurisdiction defendants is only permitted if the base defendant was domiciled in England on the date of service of process.

Meanwhile, on the advice of counsel, Mora had declined to comply with the Mareva order, and as a result Mora was "debarred"[4] from defending on the tracing claim. Following a damages assessment hearing, plaintiff obtained judgments against Mora totaling close to $600,000.

In January 1999, plaintiffs applied to the English High Court to include Mora in the conspiracy claim previously asserted against the other defendants, and to add Chascona

4. Black's Law Dictionary, 7th ed., defines debarment as "the act of precluding someone from having or doing something."

as a defendant on the conspiracy claim, pursuant to an Amended Statement of Claim. Once again, the English court was required to examine the evidentiary showing submitted by plaintiffs and determine that a "good arguable case" existed regarding the claims of conspiracy against Mora and Chascona. Upon such conclusion, the court granted leave to add Chascona as a necessary or proper party and to amend the claim against Mora. The order explained that the prior debarment of Mora did not apply to the new conspiracy claim.

Chascona interposed the same jurisdictional defense as that made by Mora, but adjourned it pending the House of Lords ruling on Mora's challenge.

In July 1999, plaintiffs applied ex parte for an order increasing the amount of the restrained assets under the Mareva order against Mora to $420,000,000 (Can.), and extending the same order to Chascona. On this application, too, the English High Court examined the presented evidence to determine whether plaintiffs had established the requisite "good arguable case." Following its review of the plaintiffs' showing, on July 23, 1999, the court granted this application.

Thereafter, as a result of their failure to comply with the new Mareva order, both Mora and Chascona were debarred from defending against the conspiracy claims. In November 1999, plaintiffs applied to the court, on notice to defendants, for an assessment of damages, and a hearing was held. In December 1999, judgments of about $330 million (US) were entered against both Mora and Chascona.

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The New York Proceedings

Plaintiffs, in an effort to recover under the English judgments, undertook to seize defendants' property in New York, which is worth some $30 million. Accordingly, in May of 2000, they commenced the underlying action, asserting a cause of action for recognition and enforcement of the judgments entered in their favor in the English High Court, and seeking in addition a protective attachment. Plaintiffs thereafter requested, and were granted, a temporary fiscal monitor to review the accounts of the Hotel Gorham to ensure that there was no dissipation of assets. They then moved for an order to confirm the attachment, as well as for summary judgment recognizing and docketing as fully enforceable the English court judgments, while defendants cross-moved for dismissal.

Plaintiffs' motions were granted and defendants' request for dismissal denied.

DISCUSSION

The primary focus of defendants' argument on appeal is that the money judgments were obtained in the absence of both personal jurisdiction and due process, and therefore should not be permitted enforcement here. Specifically, defendants assert that neither Mora nor Chascona have or had any contacts with England, and therefore the English court's assertion of personal jurisdiction is incompatible with fundamental principles of our law. They also contend that Mora and Chascona were denied due process of law in the English proceedings, emphasizing the ex parte aspect of the

English procedures to suggest that it was not compatible with basic due process rights.

Determination of the jurisdiction issue turns on the application of Article 53 of the CPLR, New York's enactment of the Uniform Foreign Country Money-Judgments Recognition Act (*see*, CPLR 5309), which concerns the recognition and enforcement of money judgments issued by the courts of foreign countries. Under Article 53, a money judgment issued by the court of a foreign country will be recognized and enforceable in New York State, unless it fits within one of the specific statutory exceptions set forth in CPLR Article 53 (*see*, CPLR 5303, 5304; *Watary Servs. v Law Kin Wah*, 247 AD2d 281, 282).

The two grounds for *mandatory* non-recognition of foreign money judgments, set forth in 5304(a), are that the foreign judgment was

> (1) * * * rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; [or]
>
> (2) the foreign court did not have personal jurisdiction over the defendant.

Defendants rely upon both subsections as grounds for denying enforcement here.

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Due Process

There are few cases in which recognition of a foreign money judgment is denied for lack of due process under the CPLR 5304(a)(1); review of them illustrates the type of circumstances necessary to successfully establish that a judicial system failed to provide procedures compatible with due process of law. In *Bank Melli Iran v Pahlavi*, (58 F3d 1406, 1411-1412, *cert denied* 516 US 989), there was evidence that Iranian trials were highly politicized, that the government did not believe in an independent judiciary, that the judiciary was biased, and that the defendant, the sister of the deposed Shah, could not possibly have gotten a fair trial in Iran. In *Bridgeway Corp. v Citibank* (45 F Supp 2d 276, 287, *affd* 201 F3d 134), there was a showing that the Liberian Constitution had been suspended, that corruption and incompetence in handling of legal cases was prevalent, and that litigants' due process rights were frequently ignored (*see also*, *Choi v Kim*, 50 F3d 244, 249-250; *Banco Minero v Ross*, 106 Tex 522, 172 SW 711, 715).

In contrast, in *S.C. Chimexim S.A. v Velco Enter.*, (36 F Supp 2d 206), the court concluded that the requirements of due process were satisfied by the Romanian judicial system that was newly reformed in 1992, following the country's adoption of a new Constitution in 1991 after the overthrow of the former Communist regime in 1989. Despite studies indicating that Romania's new judicial system was still not strictly following the procedures necessary to implement the basic due process guarantees contained in the new Constitution, and that it "lag[ged] badly behind many of its neighbors in clearly breaking away from the Communist past"

(*id.* at 213 n.6, 214), the court concluded that the evidence regarding Romania's current judicial system sufficiently demonstrated that it is an independent system containing due process guarantees and providing impartial tribunals (*id.* at 214).

The English system of law cannot reasonably be compared with the type of system that fails to provide due process (*see*, *Society of Lloyd's v Ashenden*, 233 F3d 473, 476, and authorities cited therein; *Dynamic Cassette Inter. Ltd. v Mike Lopez & Assocs.*, 923 F Supp 8). Recognizing this, defendants, rather than contending that the English judicial system in general fails to protect litigants' due process rights, take issue with particular aspects of this particular English proceeding, particularly the English court's use of the "Mareva" injunction.

However, since the subsection refers to "a *system* which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" (CPLR 5304[a][1]), it cannot be relied upon to challenge the legal processes employed in a particular litigation on due process grounds. As the Seventh Circuit Court of Appeals explained, discussing the same provision from Illinois' enactment of the Uniform Foreign Money-Judgments Recognition Act,

> The statute, with its reference to 'system,' does not support such a retail approach, which would moreover be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions—which would in effect give the

judgment creditor a further appeal on the merits.

(*Society of Lloyd's v Ashenden*, 233 F3d 473, 477, *supra.*)

Moreover, it is important to recall that the *Mareva* order is simply a provisional remedy; it does not remove from a defendant title or the power to conduct its ordinary business. Indeed, it bears some similarity to the grant of the provisional remedy of an order of attachment against an out-of-jurisdiction defendant (*see*, CPLR 6201[1]).

Defendants assert that the Mareva injunction has been criticized by the United States Supreme Court, which quoted commentators who characterized the injunction as "the 'nuclear weapon of the law' " (*see*, *Grupo Mexicano de Desarrollo v Alliance Bond Fund*, 527 US 308, 329, quoting Ough & Flenley, The Mareva Injunction and Anton Piller Order: Practice and Precedents xi [2d ed. 1993]). However, while the Court in *Grupo Mexicano* declined to permit injunctive relief as broad as the English Court permits with the Mareva injunction, it never suggested that such a practice would be violative of the due process protections of the Constitution; rather, it merely suggested that such a change in the law's protection for debtors was best left to Congress (*id.*).

Additionally, since defendants exercised their right to seek to vary or discharge the Mareva orders without submitting to jurisdiction, the suggestion that procedures regarding such orders were completely ex parte is inaccurate.

Furthermore, imposition of a money judgment following the taking of a default against a defendant based upon the

defendant's failure to comply with discovery is an accepted procedure in this state, even where the defendant interposed (and lost) a jurisdictional challenge (*see*, *Reynolds Sec., Inc. v Underwriters Bank & Trust Co.*, 44 NY2d 568, 571-72). A defendant in a New York action who failed to comply with interim court orders may properly be subject to a judgment in the full amount sought in the complaint.

Nor have defendants established that any court proceedings took place that were prohibited by a stay. While the appellate court extended Mora's time to respond to the Writ until 14 days after the House of Lords' decision on the appeal of the personal jurisdiction issue, it did not stay all proceedings. Specifically, that extension of Mora's time to respond to the Writ had no effect on the issuance of the Mareva injunction and plaintiffs' right to take action to enforce Mora's obligation to comply with it. Indeed, Mora was debarred, and defaults taken, based not upon a failure to answer the summons, but upon the failure to comply with the Mareva order requiring disclosure prior to the running of Mora's time to respond. The issuance of orders punishing a party for failure to comply with injunctive relief or disclosure orders, even before defendant's time to serve its answer has run, or before it has been determined whether they are amenable to personal jurisdiction (*see*, *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 465), is a procedure sometimes employed in the courts of this state as well (*see*, CPLR 6301, 6311[1], 3106[a]; *Halitzer v Ginsberg*, 80 AD2d 771, 772).

Moreover, the House of Lords' decision was issued on October 12, 2000, causing Mora's time to respond to expire

on October 26, 2000. Mora did nothing within that time period to respond to the summons, nor did it take any action to challenge the ruling that it was in contempt of the Mareva order.

In any event, defendants received the basic requisites of notice and the opportunity to be heard (*see*, *Society of Lloyd's v Grace*, 278 AD2d 169). Their decision not to participate in litigating the merits of the proceeding, in an effort to protect their rights to interpose a collateral challenge to enforcement of a final judgment, cannot form the basis of a claimed denial of due process (*see*, *Ocean Warehousing B.V. v Baron Metals & Alloys, Inc.*, 157 F Supp 2d 245, 251-252).

We perceive no valid due process complaint here based upon the procedures followed.

Personal Jurisdiction

A foreign money judgment may not be granted recognition and enforcement when "the foreign court did not have personal jurisdiction over the defendant" (CPLR 5304[a][2]).

The determination of whether the English court lacked personal jurisdiction over Mora and Chascona involves several interrelated issues.

Initially, before considering the substantive merits of the personal jurisdiction issue, we must first address plaintiffs' contention that inasmuch as defendants actively litigated the

issue of personal jurisdiction in England, the determination by the English court on that issue must be given res judicata effect, precluding its further consideration here. The threshold question is, therefore, whether defendants have the right to de novo review by this Court of the propriety of the English court's assertion of personal jurisdiction.

Res Judicata

In arguing that res judicata must be applied to the English court's determination that personal jurisdiction was proper, plaintiffs rely primarily on cases involving money judgments of sister States rather than cases involving judgments of foreign countries. As to judgments of sister States, the rule is well settled: a defendant who has made a special appearance to challenge the jurisdiction of the sister State's courts, and whose position has been considered and rejected by that court, may not be heard to raise the jurisdictional challenge anew when the plaintiff seeks to enforce the judgment in a second State (*see, Baldwin v Iowa State Traveling Men's Assn.*, 283 US 522).

However, the same rule does not automatically apply to the judgments of foreign countries. As one Federal District Court has noted, "New York courts have consistently distinguished between judgments of sister states, which must be accorded full faith and credit as a matter of constitutional law, and judgments of foreign countries, for which full faith and credit is not constitutionally mandated" (*Nippon Emo-Trans Co. v Emo-Trans, Inc.*, 744 F Supp 1215, 1229, citing *Schoenbrod v Siegler*, 20 NY2d 403, 409 n.3).

Indeed, the Federal District Court in *Nippon* held that "[a] defendant who appears solely for purposes of contesting jurisdiction will not, by such appearance, waive any jurisdictional objection in a subsequent suit to enforce the foreign judgment" (*Nippon Emo-Trans Co. v Emo-Trans, Inc.*, 744 F Supp 1215, 1221). While acknowledging the complicated nature of this issue, that Court went on to state that "As a general rule, any appearance in which a defendant merely challenges the jurisdiction of the foreign court should qualify under the exception found in Section 5305(a)(2), regardless of the basis on which the foreign court upholds its jurisdiction" (*id.* at 1222).

Plaintiffs concede that had defendants defaulted completely rather than appearing before the English court for the limited purpose of challenging its jurisdiction over them, defendants would now have the right to ask this court to examine whether a proper basis existed for the English court's assertion of jurisdiction (*see, e.g., Boorman v Deutsch*, 152 AD2d 48, 54, *lv dismissed* 76 NY2d 889; *Insurance Corp. of Ireland v Compagnie des Bauxites de Guinee*, 456 US 694, 706). However, other than the *Nippon* case, there is no established case law as to whether, where a defendant interposed a limited appearance in the foreign court for the sole purpose of challenging the foreign court's jurisdiction, and loses on that issue, res judicata effect must be given to the foreign court's determination that the exercise of personal jurisdiction is proper.

Review of the bare language of CPLR 5305(a)(2) seems to support the suggestion that a New York court may, following a limited, special appearance, review the issue of

whether the foreign court had personal jurisdiction over a defendant. Since the statute provides that recognition is *not* required where a defendant appeared in the proceedings solely for the purpose of contesting the jurisdiction of the court over him, logic informs us that the propriety of the personal jurisdiction exercised by the foreign court is not absolutely established as a fact following that appearance and unsuccessful challenge.

If the contrary were true, then any time a defendant appeared in a foreign jurisdiction for the limited purpose of challenging jurisdiction, once the foreign court rejected that challenge and issued a money judgment, no further challenge here would be permissible. Since a foreign court's determination that it has personal jurisdiction does not necessarily comport with the prerequisites of this country's Constitution for such a finding, an assertion of jurisdiction by a foreign court should not preclude a challenge here. Such a challenge is not, in fact, a second bite of the apple on the jurisdiction issue.

The discussion contained in the Restatement (Third) of Foreign Relations Law provides a proposed framework for considering this point:

> Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate.

* * *

Appendix B

> If the defendant appeared in the foreign court to challenge the jurisdiction of the court and failed to prevail, it is not clear whether such determination will be considered *res judicata* by a court in the United States asked to recognize the resulting judgment.

(§ 482, comment c). The comment goes on to suggest different appropriate degrees of inquiry, depending upon the foreign court's basis for its assertion of jurisdiction. For instance, if the foreign court relied upon a finding of fact that would support an assertion of personal jurisdiction here, that court's determination should be respected, while if the foreign court depended solely upon a legal analysis, we should scrutinize the analysis to determine if the jurisdictional determination accords with our principles (*see*, *id.* at 607).

Plaintiffs point out that in the case of *Fairchild, Arabatzis & Smith, Inc. v Prometco (Produce & Metals) Co.*, the Southern District Court remarked that "by litigating and losing the issue of personal jurisdiction in Britain, [the defendant] has no right to contest the jurisdiction of that court in a collateral action" (470 F Supp 610, 615). However, in that case the defendant had entered what amounted to a voluntary general appearance. Indeed, the Court took particular note that the defendant could have appeared solely for the purpose of challenging jurisdiction without entering an unconditional appearance as it did (*see*, *id.*, at n.5).

Upon consideration of the foregoing, we hold initially that, in this instance, res judicata effect should not be given

to the English court's rejection of defendants' jurisdictional challenge, except to the extent the English court made a factual finding as to how service had been made upon Stolzenberg, and its conclusion that by such service it obtained jurisdiction over the action. Defendants were unable to raise the assertion there that they had no contacts with England, because addressing the merits of whether they were co-conspirators would arguably constitute a defense on the merits of the substantive claim against them, which indeed could have led to the application of CPLR 5305(2) to prevent them from contesting jurisdiction here (*see, S.C. Chimexim S.A. v Velco Ents. Ltd.*, 36 F Supp 2d 206). Consequently, the merits of that court's exercise of personal jurisdiction over Mora and Chascona should be addressed here.

Necessary Proof on the Issue of Personal Jurisdiction

While CPLR Article 53 attempts to avoid the need for extensive analysis by clearly establishing the circumstances under which our courts will and will not recognize and enforce money judgments issued by the courts of foreign countries, the circumstances of this case are not clearly covered by the provisions of that statute.

Specifically, the statute provides that a money judgment issued by a court of a foreign country will *not* be recognized if the foreign court "did not have personal jurisdiction over the defendant" (CPLR 5304[a][2]). However, although CPLR 5305(a) goes on to list six specific circumstances in which a foreign money judgment "shall not be refused recognition for lack of personal jurisdiction," none of those

specifics apply directly to this case. The complete section provides as follows:

> (a) Bases of jurisdiction. The foreign country judgment shall not be refused recognition for lack of personal jurisdiction if:
>
> 1. the defendant was served personally in the foreign state;
>
> 2. the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
>
> 3. the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
>
> 4. the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
>
> 5. the defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

> 6. the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action rising out of such operation.
>
> (b) Other bases of jurisdiction. The courts of this state may recognize other bases of jurisdiction.

None of the six bases for jurisdiction specified in 5305(a) apply here. Indeed, these circumstances fall within the exception contemplated by subdivision (a)(2), specifically, its exception from the jurisdictional predicate based upon a personal appearance in the foreign court, where:

> "2. the defendant voluntarily appeared in the [foreign] proceedings . . . *other than* for the purpose of . . . contesting the jurisdiction of the court over him" [emphasis added].

Although application of this exception does not establish the converse, namely, that personal jurisdiction *must* be lacking where a defendant appeared only for the purpose of contesting jurisdiction, it does mean that defendants' limited appearance in the English court may not *in itself* suffice to establish personal jurisdiction under 5305(a).

Plaintiffs therefore rely upon the catch-all provision of CPLR 5305(b), which broadly provides that "[t]he courts of this state may recognize other bases of jurisdiction." Plaintiffs suggest that the English law's concept of "necessary or proper party" jurisdiction should be viewed to constitute such an "other basis of jurisdiction" as is covered by

CPLR 5305(b). We are unwilling to accept so broad a proposition.[5] The question is not whether the foreign court properly exercised jurisdiction under its own laws. The use of the term "personal jurisdiction" in CPLR 5305 necessarily contemplates the definition of that term as understood in our jurisprudence.

As Professor Siegel explains in his commentary to CPLR 5305, "New York is free, under subdivision (b), to recognize in respect of the foreign judgment any other jurisdictional basis that New York law finds congenial to its notions of comity. . . . It would seem appropriate for New York to recognize for a foreign judgment, under subdivision (b) of CPLR 5305, *any jurisdictional basis it recognizes in its internal law*" (*see*, *Siegel*, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5305, at 556 [emphasis added]). That position was adopted by the Fourth Department in *Porisini v Petricca*, (90 AD2d 949, *supra*), where an English money judgment obtained in England against a New York domiciliary was held to be enforceable here based upon the evidentiary submissions before the English court tending to show that the defendant, along with two others, had rented and occupied an apartment in London, but had failed to pay the agreed rent. Since long-arm jurisdiction would have been proper under CPLR 302(a)(4), a "jurisdictional basis . . . recognize[d] in [our] internal law" existed, making the English court's exercise of personal jurisdiction over the defendant proper (90 AD2d at

5. Notably, both parties agree that an English court may exercise "necessary or proper party" jurisdiction over someone outside England regardless of whether that party, or even that cause of action, has any connection to England.

950, *supra* [emphasis added], citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5305). Similarly, in *Canadian Imperial Bank of Commerce v Saxony Carpet Co.* (899 F Supp 1248, *affd.* 104 F3d 352), the assertion of personal jurisdiction by a Canadian court in a collection action on an account receivable was held to have been proper where a New York business had ordered carpets from a Canadian manufacturer. Although the underlying negotiations and transactions took place in New York, the court held that long-arm jurisdiction would have been proper under CPLR 302(a)(1), because a "clear nexus existed between business transacted by the defendant and the cause of action" where the court specified that "[t]o be subject to in personam jurisdiction in a foreign court, a defendant must have had certain 'minimum contacts' with the forum state" (*id.* at 1252-1253, citing *Ackermann v Levine*, 788 F2d 830, 838; *see also*, *Soloman Ltd. v Biederman & Co.*, 177 AD2d 350, 351).

Therefore, in order to recognize and enforce the money judgments issued by the English High Court against defendants, plaintiffs had to show that based upon the evidentiary materials presented to the English court, the law of this State would permit the exercise of personal jurisdiction over defendants (*see*, CPLR 302; *International Shoe Co. v Washington*, 326 US 310, 316). We turn to the submissions contained in the record to evaluate this issue.

First, however, it must be established which party has the burden of proof, and what that burden is. Plaintiffs assert that it is defendants' burden to demonstrate that the foreign court lacked jurisdiction; they rely upon *Browne v Prentice*

Dry Goods, Inc., (1986 WL 6496, 1986 US Dist LEXIS 24632 [S.D.N.Y. 1986]). However, in that ruling, the District Court relied upon *Overmyer v Eliot Realty* (83 Misc 2d 694), which concerned a judgment of a sister State—which is entitled to full faith and credit—rather than that of a foreign court, which is not.

The weight of case law supports defendants' contention that in order to obtain recognition and enforcement of a foreign country's judgment, its proponent must initially make a prima facie showing of

> (1) a final judgment, conclusive and enforceable where rendered; (2) subject matter jurisdiction; (3) jurisdiction over the parties or the res; and (4) regular proceedings conducted under a system that provides impartial tribunals and procedures compatible with due process

(*see*, *Ackermann v Levine*, 788 F2d 830, 842 n12, *citing Hilton v Guyot*, 159 US 113 and Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 Intl L 425, 429-432; *see also*, *Allstate Ins. Co. v Administratia Asigurarilor De Stat*, 962 F Supp 420, 425; *Bridgeway Corp. v Citibank*, 45 F Supp 2d 276, 286, *affd* 201 F3d 134; *Dresdner Bank AG v Haque*, 259, 262-263). We concur with the analysis of these cases.

Review of the record reflects that plaintiffs successfully made the necessary showing, that defendants' conduct, as set forth in materials submitted in the English action, provided the necessary predicate for England's exercise of

personal jurisdiction over them under our Constitutional standards (*see*, *International Shoe Co. v Washington*, 326 US 310, 316).

"Regarding the New York standards pertaining to *in personam* jurisdiction, no simple test exists to determine the propriety of jurisdiction," and " 'proof of one transaction in New York is sufficient to confer jurisdiction [over a nonresident] as long as the activities of the defendant in question were purposeful and there is a substantial relationship between the transaction and the claim asserted' " [cite omitted] (*Canadian Imperial Bank of Commerce v Saxony Carpet Co.*, *supra*, at 1253).

Plaintiffs rely upon the concept of co-conspirator jurisdiction to provide the basis for England's exercise of personal jurisdiction. Application of this concept requires a showing that defendants were part of a conspiracy, at least part of which took place within the jurisdiction (*see*, *Cleft of the Rock Found. v Wilson*, 992 F Supp 574, 581-582; *Dixon v Mack*, 507 F Supp 345, 352).

To illustrate: in *Dixon v Mack*, *supra*, Mitchell Dixon, an adherent of the Unification Church, brought an action in the Southern District of New York, alleging that a conspiracy had deprived him of his civil rights by forcibly abducting him from New York City and driving him to out-of-State locations, first in New Jersey, then in Pennsylvania, where certain of the defendants attempted to "deprogram" him. Defendant William Rick was a Pennsylvania psychiatrist hired by one of the other defendants, after the abduction, to examine Dixon, following which Rick wrote a report

asserting that in his professional opinion, Dixon was "unbalanced" (*id.* at 347). Rick, in moving to dismiss the complaint against him for lack of personal jurisdiction, asserted that his practice was in Pennsylvania and he had no connection to New York, and indeed, that his only act was to examine Dixon, in Pennsylvania, after Dixon's abduction (*id.*). However, the court noted that the allegations of the complaint and some evidentiary materials gave rise to reasonable inferences not only that Rick knew he was participating in an effort to "reprogram" Dixon, but that in the process of joining the conspiracy he subsequently ratified Dixon's abduction (*id.* at 348-349). Consequently, his alleged participation in the conspiracy, including his ratification of an act that took place in New York, was sufficient for a prima facie showing that New York could properly exercise jurisdiction over Rick, although the denial of his motion was without prejudice to renewal at trial (*id.*).

The affidavits and supporting materials provided to the English court were sufficient to have demonstrated, prima facie, that Mora and Chascona, through their owner, Marco Gambazzi, were active participants in the conspiracy alleged in the present case, which conspiracy included acts which took place in England.

Specifically, plaintiffs submitted affidavits explaining that to accomplish the complained-of fraud, the four individual defendants named in the English action, Wolfgang Stolzenberg, Marco Gambazzi, Edwin Bänziger, and Karsten Bodo Von Wersebe, misrepresented Castor Holdings to investors as a bona fide investment company in a healthy financial position, while knowingly manipulating Castor's

business and financial accounts so as to avoid disclosing the true facts. These four individuals, it was explained, used their positions in both Castor subsidiaries and in the companies to which Castor made loans, so as to disguise the actual flow of funds between Castor Holdings and related borrowers, lenders and developers. While Castor's accounts made it appear to investors as an active, growing business consisting of performing loans, new loans and reasonable returns, these individuals disguised the true nature and value of the projects to which loans were made, the purpose for which the funds would be used, and the extent of returns Castor received on the loans.

Plaintiffs' showing tends to support not only the proposition that Gambazzi individually played a significant role in the alleged conspiracy, but also that Gambazzi acted on behalf of Mora and Chascona as well.

There was evidence that both Mora and Chascona were controlled, as well as owned in whole or in part, by individual defendant Marco Gambazzi. In official filings in New York State, Gambazzi described himself as Mora's Chief Executive Officer. He was at least a part-owner of Chascona, and regularly acted on its behalf during the pertinent time period. There was also evidence that on defendants' behalf, Gambazzi retained Wolfgang Stolzengerg, the asserted ringleader of the Castor Holdings fraud scheme, as a management consultant for Mora, Chascona, and the Gorham Hotel, in 1989.

Mora and Chascona, the documents explain, were among the companies that received loans from and gave mortgages to various Castor-related entities. While the financial

arrangements set out in plaintiffs' submissions are too elaborate to discuss in this context, the loans Stolzenberg and/or Gambazzi arranged for Mora and Chascona to receive from Castor fall within the pattern of Castor's typical scheme. For example, on one Castor loan, an arrangement was made for partial refinancing on terms that left Castor unsecured as to a balance of over $2 million. Additionally, interest on loans made to Mora and Chascona was capitalized without the capitalization of interest revealed in Castor's financial statements. By the time of Castor's collapse, a total of approximately $21.35 million was owed by Mora and Chascona on loans from Castor.

Sufficient information was submitted to the English High Court to make a prima facie showing that Gambazzi and/or Stolzenberg, acting on behalf of Mora and Chascona as well as individually, knowingly caused the Castor Group to make loans to Mora and Chascona under the foregoing terms as part of a fraudulent scheme, using funds procured from investors through the use of misrepresentations.

Furthermore, the asserted conspiracy, as it was set forth in the documents plaintiff submitted to the English High Court, had sufficient connection to England to permit a proper exercise of jurisdiction over any knowing co-conspirator, and Mora and Chascona, due to the knowledge they possessed through Gambazzi, were properly included as such.

Inasmuch as plaintiffs made a prima facie showing that defendant corporations, through Marco Gambazzi, were active participants in the conspiracy asserted in the English action, it must be concluded that the English court's exercise

of personal jurisdiction over Mora and Chascona was presumptively proper, unless evidence presented by defendants successfully demonstrated that plaintiffs' prima facie showing was false.

It has all along been defendants' position that (1) the Castor Holdings fraud was perpetrated solely by Stolzenberg, and Gambazzi was merely an outside director who also invested his own and his corporations' money and was therefore as much an innocent victim as Castor's other investors; (2) Mora and Chascona were unconnected with the fraud, having merely received (and largely repaid) a loan from a Castor subsidiary; (3) the fraud took place solely in Canada and the United States. However, their affidavits in support do not succeed in demonstrating that the English court lacked a basis to exercise personal jurisdiction over them (*see*, *Porisini v Petricca*, *supra*). Accordingly, their challenge to the judgments under CPLR 5404(a) must fail.

Other Grounds for Non-Recognition of Foreign Judgments

Defendants raise, for the first time on appeal, several other grounds for declining to enforce the English judgments, derived from subdivision (b) of CPLR 5304, which identifies seven additional grounds upon which to deny recognition of judgments issued by the courts of foreign countries. Defendants contend (1) that the English judgments are "repugnant to the public policy of this state" (CPLR 5304[b][4]) because the Mareva order is incompatible with the American approach to the judiciary's equitable powers; (2) that "the judgment conflicts with another final and conclusive judgment" (CPLR 5304[b][5]), since the public

prosecutor of the Canton of Ticino, Switzerland, after conducting an investigation of a complaint by one of the plaintiffs against Gambazzi and other individuals, decided not to prosecute; (3) that the amounts of the judgments are unconscionable; and (4) that England was a seriously inconvenient forum (CPLR 5304[b][7]). It is undisputed that defendants bear the burden of proving these discretionary grounds for non-recognition.

Defendants' failure to raise these contentions before the motion court constitutes a waiver of them. Moreover, were we to address these contentions on their merits, we would reject them. The exercise of discretion by a Swiss prosecutor in dismissing a charge brought against Marco Gambazzi simply does not constitute the sort of "final and conclusive" judgment contemplated by CPLR 5304(b)(5). Defendants' assertion of inconvenient forum is inapplicable, since CPLR 5304(b)(7) applies to circumstances where "jurisdiction [is] based only on personal service, [and] the foreign court was a seriously inconvenient forum for the trial of the action," because here the English court's jurisdiction over defendants was not based solely upon personal service. Finally, we do not find plaintiffs' recovery of losses from defendants arising out of the asserted fraudulent conspiracy to be in any way repugnant to the public policy of New York.

The motion court's appointment of a temporary fiscal monitor in the context of the interim application was proper, inasmuch as the monitor's duties were limited to review of the Hotel's accounts to ensure its assets were not dissipated or mishandled, and no affirmative control was taken over defendant's assets prior to final judgment.

Appendix B

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Ira Gammerman, J.), entered January 16, 2001, which, *inter alia*, granted plaintiffs' motion for summary judgment recognizing and docketing certain judgments entered in their favor in the High Court of Justice, Chancery Division, London, England, should be affirmed, with costs.

All concur.

ENTERED: MAY 28, 2002

s/ Catherine O'Hague Wolfe
CLERK

APPENDIX C — JUDGMENT AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK DATED JANUARY 5, 2001 AND FILED JANUARY 16, 2001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 00/602149

IAS Part 27 Case No. 15979

Gammerman, J.

CIBC MELLON TRUST COMPANY, in its capacity as Trustee of the Chrysler Canada Ltd.'s Benefits Plan, the Chrysler Canada Ltd. Master Trust Fund, the Chrysler Canada Ltd. Non-Canadian Master Trust Fund, the Holmes Foundry Division Master Trust Fund, and the Chrysler Canada Ltd. Supplemental Unemployment Benefit Plans, and DAIMLERCHRYSLER CANADA INC.,

Plaintiffs,

- against -

MORA HOTEL CORPORATION N.V. and CHASCONA N.V.,

Defendants.

Appendix C

JUDGMENT AND ORDER

Plaintiffs, CIBC MELLON TRUST COMPANY and DAIMLERCHRYSLER CANADA INC. ("Plaintiffs"), having commenced this action against defendants, MORA HOTEL CORPORATION N.V. and CHASCONA N.V. ("Defendants"), by Summons and Complaint dated May 18, 2000, seeking recognition, pursuant to the Uniform Foreign Country Money-Judgments Recognition Act [CPLR Article 53] and the common law of the State of New York, of judgments entered in the High Court of Justice, Chancery Division, London, England on February 4, 1999, October 21, 1999 and December 7, 1999 in favor of Plaintiffs and against Defendants (the **"English Judgments"**); and

Plaintiffs having on May 25, 2000 applied for and this Court on May 25, 2000 having made an "Ex Parte Order of Attachment," entered on May 30, 2000, against the New York property of the Defendants (the **"Order of Attachment"**), including, *inter alia*, land and buildings in the County of New York known as the Hotel Gorham and the proceeds therefrom (the **"Hotel"**); and the Sheriff of the City of New York, in the County of New York, having levied upon the Hotel on June 7, 2000 by filing the Order of Attachment with the County Clerk and serving it upon the Defendants; and Plaintiffs having moved on notice to Defendants, by "Order to Show Cause to Confirm Order of Attachment" signed on June 9, 2000 (with supporting papers), for an order confirming the Order of Attachment (the **"Motion to Confirm"**); and

Appendix C

Plaintiffs having on May 25, 2000 applied *ex parte* for an order temporarily restraining Defendants and their agents from transferring, encumbering or impairing Defendants' interests in any New York property, including the Hotel, and temporarily appointing a special fiscal monitor to oversee the finances of the Hotel; and this Court having on May 25, 2000 granted Plaintiffs' application and signed an "Order to Show Cause, Temporary Restraining Order and Temporary Appointment of Special Fiscal Monitor" (the **"Monitor Order"**), **(A)** bringing on Plaintiffs' motion for (i) a preliminary injunction restraining Defendants and their agents from transferring, encumbering or impairing Defendants' interests in any New York property and (ii) the appointment of a special fiscal monitor to oversee the finances of the Hotel (the **"Monitoring Motion"**), **(B)** restraining Defendants and their agents from transferring, encumbering or impairing Defendants' interests in any New York property, and **(C)** appointing The Honorable Burton S. Sherman to serve as a temporary special fiscal monitor (the **"Special Monitor"**) to oversee the finances of the Hotel; and

Defendants having opposed the Motion to Confirm and the Monitoring Motion; and

This Court having on September 12, 2000 orally continued the Monitor Order; and this Court having by order dated November 8, 2000 further continued the Monitor Order through and after final judgment and enjoined Defendants from making any transfers or payments excepting those to be made in the ordinary course of the Hotel's business; and

Appendix C

While the Motion to Confirm and the Monitoring Motion were pending, Plaintiffs having moved, by Order to Show cause signed on November 8, 2000 (with supporting papers), **(A)** pursuant to CPLR 3212, for a summary judgment recognizing and docketing the English Judgments as fully enforceable judgments of this Court, **(B)** pursuant to CPLR § 5228, for the appointment of a receiver over Defendants' property, and **(C)** pursuant to CPLR § 5225, for an order directing Defendants to turn over their assets, including the Hotel, to said receiver (the **"Summary Judgment, Receivership and Turnover Motion"**); and

Defendants having opposed the Summary Judgment Motion and having cross-moved for a summary judgment dismissing the Complaint (the **"Motion to Dismiss"**); and

This Court having read and filed the following papers: Plaintiffs' Summons and Complaint (with exhibits), dated May 18, 2000; Order to Show Cause, Temporary Restraining Order and Temporary Appointment of Special Fiscal Monitor, signed May 25, 2000; *Ex Parte* Order of Attachment, signed May 25, 2000; Sealing Order, signed May 22, 2000; Affidavit of James Irvine (with exhibits), sworn to May 17, 2000; Compendium of Exhibits to the James Irvine Affidavit; Affirmation of Leon P. Gold, Esq. (with exhibits), dated May 18, 2000; Affidavit of Thomas P. McConnell (with exhibit, sworn to May 15, 2000; Memorandum of Law in Support of Plaintiffs' Application for an Ex Parte Order of Attachment, and Order to Show Cause for a Preliminary Injunction, with Temporary Restraining Order, and the Appointment of a Special Fiscal Monitor, dated May 18, 2000; Undertaking on Attachment, dated May 24, 2000;

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Undertaking dated June 5, 2000; Order to Show Cause to Confirm Order of Attachment, signed June 9, 2000; Affidavit of David A. Picon, Esq. in Support of Motion by Order to Show Cause for an Order Confirming Order of Attachment (with exhibits), sworn to June 9, 2000; Affidavit of Charles A. Pugh (with exhibits), sworn to September 6, 2000; Compendium of Exhibits to the Charles Pugh Affidavit (two volumes); Reply Affidavit of Mortimer G. Freiheit, Esq. (with exhibits), sworn to September 7, 2000; Reply Affirmation of Bart Schectman, Esq., dated September 11, 2000; Plaintiffs' Reply Memorandum in Further Support of their Motions for a Preliminary Injunction and to Confirm the Attachment and the Appointment of a Special Fiscal Monitor, dated September 11, 2000; Order to Show Cause signed November 8, 2000; Affidavit of Charles A. Pugh (with exhibit), sworn to November 3, 2000; Affirmation of Bart Schectman, Esq. (with exhibits), dated November 6, 2000; Plaintiffs' Memorandum of Law in Support of Their Motions for Summary Judgment and Appointment of a Receiver to Enforce The English Judgments, dated November 6, 2000; Plaintiffs' Reply Memorandum in Further Support of their Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion (with attachments), dated December 1, 2000; Defendants' Answer to the Complaint, dated August 18, 2000; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motions for Preliminary Injunction, Appointment of a Special Fiscal Monitor and to Confirm the Order of Attachment (undated); submitted August 18, 2000; Affidavit of Charles E. Flam, Esq. (with exhibits), sworn to August 16, 2000; Affidavit of David A. Sabo, Esq., sworn to August 18, 2000; Affidavit of Lawrence O. Kamin, Esq. (with exhibits) sworn to August 18, 2000;

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Defendants' Sur-Reply Memorandum of Law in Opposition to Plaintiffs' Motions for a Preliminary Inunction, Appointment of a Special Fiscal Monitor and to Confirm the Ex Parte Order of Attachment (undated), submitted September 28, 2000; Second Affidavit of David A. Sabo, Esq., sworn to September 28, 2000; Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and In Support of Defendants' Cross-Motion for Summary Judgment (undated), submitted November 28, 2000; Second Affidavit of Lawrence O. Kamin, Esq. (with exhibits), sworn to November 28, 2000; and Affidavit of Iain H. Mackie, sworn to November 28, 2000; and

This Court, having considered all of the parties' proofs and the arguments of counsel, finds that there exists no genuine issue of material fact precluding the disposition of the pending motions as a matter of law.

The Order of Attachment was duly issued, levied and served. Grounds for the attachment exist pursuant to CPLR § 6201(5) because plaintiffs' cause of action is based on a foreign judgment, and the attachment should be confirmed pursuant to CPLR § 6212(a) because plaintiffs demonstrated that they were likely to succeed on the merits of their cause of action based on the English Judgments which, as detailed below, qualify for recognition under Article 53 of the CPLR, and the amount of the English Judgments against the Defendants exceeds all known counterclaims.

The Court further finds that Plaintiffs are entitled to the requested preliminary injunction because they have

demonstrated a likelihood of success on the merits of their cause of action for recognition of the English Judgments and a risk of irreparable harm absent the injunction in view of Defendants' demonstrated participation in a fraudulent scheme to hide assets from creditors (see CPLR § 6301).

The Court further finds that Plaintiffs are entitled to appointment of a receiver pending any appeal herein and until further order of this Court, pursuant to CPLR § 6401.

The Court further finds that the English Judgments meet the standards for recognition set forth in Article 53 of the New York Civil Practice Law and Rules and under the common law of the State of New York in that the English Judgments grant Plaintiffs recovery of sums of money (other than for taxes, a fine or other penalty, or for support in a matrimonial or family matter) and are final, conclusive between the parties and fully enforceable in England (see CPLR §§ 5301, 5302, 5303); that the English courts provide impartial tribunals with procedures compatible with American requirements of due process of law (see CPLR § 5304(a)(1)); that Defendants have failed to present evidence sufficient to create a genuine issue of fact in relation to their contention that the English legal system failed to afford them procedures compatible with the requirements of due process of law (see *id.*); that the English courts in fact afforded the Defendants protections compatible with the fundamental American notions of due process of law; that the English courts had personal jurisdiction over the Defendants (see CPLR § 5304(a)(2)), as fully litigated before and adjudicated by the English trial and appellate courts (including England's highest court, the House of Lords),

pursuant to an application of England's rule of "necessary or proper party" jurisdiction; that as applied with respect to these Defendants, said rule is compatible with New York law regarding personal jurisdiction over non-resident co-conspirators and thus provides no basis for rejecting the English courts' determination of jurisdiction (see CPLR §§ 5304(a)(2), 5305(b)); that the English courts provided Defendants with ample opportunity to research and produce whatever evidence they wished in respect of the issue of personal jurisdiction and fully considered the plaintiffs' and the defendants' evidence concerning the residence of the anchor defendant (see CPLR § 5304(b)(3)); that the English trial court did not enter the judgments until after it determined the issue of personal jurisdiction; that the English trial court expressly provided Defendants with ample opportunities to respond to the merits of Plaintiffs' $300 million claims alleging a massive, multinational fraudulent conspiracy notwithstanding Defendants' repeated elections not to avail themselves of numerous opportunities to purge themselves of their contempts of the English court's orders; that Defendants had ample notice of and opportunity to be heard in all proceedings before the English courts relating to entry of the judgments in question (see CPLR § 5304(b)(2)); that the Defendants ultimately elected to take default judgments, resting upon their rejected objections to the English courts' jurisdiction over them; and that Defendants have failed to present evidence sufficient to create a genuine issue of material fact in support of any of their CPLR § 5304 defenses to the conclusiveness or recognition of the English Judgments. Each of the issues raised by the Defendants in respect of the English proceedings was either adjudicated therein or waived by the Defendants.

NOW, THEREFORE, after due deliberation, and upon motion of Proskauer Rose LLP, attorneys for the Plaintiffs, it is

ORDERED that Plaintiffs' Motion to Confirm the Order of Attachment is GRANTED in its entirety; and it is further

ORDERED that the Ex Parte Order of Attachment herein signed on May 25, 2000 and entered on May 30, 2000 be, and the same hereby is, confirmed; and it is further

ORDERED that Plaintiffs' Monitoring Motion is GRANTED in its entirety; and it is further

ORDERED that, pursuant to CPLR §§ 6301 and 6311, Defendants and each of their officers, directors, employees, agents, representatives, successors and assigns, and all other persons acting under their direction or control or in active concert or participation with them, be, and hereby are, ENJOINED AND RESTRAINED from selling, assigning, transferring, encumbering, mortgaging, pledging, disposing of, or otherwise relinquishing to any persons) or entity(ies) ownership, possession, custody or control of (i) their respective interests in the Hotel Gorham or any assets thereof or proceeds therefrom or (ii) their respective interests in any other property, real or personal, tangible or intangible, located within the State of New York, up to the extent of THREE HUNDRED AND THIRTY MILLION DOLLARS (U.S.$330,000,000.00); and it is further

ORDERED that, pursuant to CPLR § 6401(a), this Court's May 25, 2000 temporary appointment of the Special

Monitor to oversee the finances of the Hotel be, and hereby is, confirmed and continued until such time as Defendants turn over the Hotel and all of its assets and accounts to Judge Sherman in capacity as a post judgment receiver pursuant to the provisions of this Judgment and Order; and it is further

ORDERED that Plaintiffs' Summary Judgment, Receivership and Turnover Motion is GRANTED in its entirety; and it is further

ORDERED that Defendants' Motion to Dismiss is DENIED in its entirety; and, accordingly, it is further

ORDERED AND ADJUDGED that, in accordance with Article 53 of the New York Civil Practice Law and Rules and the common law of the State of New York, the English Judgments be, and hereby are, recognized and docketed as final, conclusive and fully enforceable money judgments of this Court in favor of Plaintiffs, CIBC MELLON TRUST COMPANY, a Canadian corporation with its principal place of business located at 320 Bay Street, Toronto, Ontario, Canada, and DAIMLERCHRYSLER CANADA INC., a Canadian corporation with its principal place of business located at 2450 Chrysler Centre, Windsor, Ontario, Canada, and against Defendants, MORA HOTEL CORPORATION N.V. and CHASCONA N.V., each being a Netherlands Antilles corporation with its principal place of business located at 136-138 West 55th Street in the City, County and State of New York, in the following amounts:

As against MORA HOTEL CORPORATION N.V., in the principal amounts of

(U.S.) $238,360.77, (Can.) $357,738.21 plus (U.S.) $386,687.95 plus (U.S.) $163,710,894.59, (Can.) $245,701,477.70 plus (U.S.) $134,315,511.10; interest in the sum of $29,945,035.62, and costs and disbursements in the sum of $260, and total sum of $328,596,750.23:

As against CHASCONA N.V., in the principal amounts of (U.S.) $163,964,876.36, (Can.) $246,082,660.00 plus (U.S.) $134,727,530.30; plus interest in the sum of $29,901,975.08, costs and disbursements in the sum of $260.00, and total sum of $328,594,651.74;

and that Plaintiffs have execution for said amount plus interest thereon at the New York statutory rate of nine percent (9%) per annum from and after the dates thereof plus such costs and disbursements as herein may be taxed by the Clerk; and it is further

ORDERED AND ADJUDGED that Plaintiffs' interest in Defendants' property secured by this judgment relates back in time to June 7, 2000, the date of the abovementioned sheriff s levy on Defendants' property pursuant to the Order of Attachment; and it is further

ORDERED that, pursuant to CPLR §§ 5228 and 5225:

(A) The Honorable Burton S. Sherman be, and hereby is, appointed as receiver (the "Receiver") of all real and personal property situate in the State of New York in which Defendants have an interest (the "Property"), including (but not limited to):

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(i) the land and buildings commonly known as 136-138 West 55th Street in the City, County, and State of New York, Section 4, Block 1007, Lot 49, including (but not limited to) the Hotel Gorham, and

(ii) all the assets of the Hotel Gorham and all proceeds therefrom, including (but not limited to) all of the Hotel's and/or the Defendants' bank, brokerage and money market accounts (including but not limited to Chase Manhattan Bank accounts numbered 0131-124489, 013-1-270415, 013-1-276099, 013-1-276107, 013-5-055342 and 777-117711 and Vista money market accounts numbered 677-50026096, 677-50026214 and 677-50027253), and all receivables and claims of any kind, liquidated or unliquidated, direct or derivative; and

(B) Upon the docketing herein of the English Judgments as judgments of this Court, Defendants (and their agents and representatives) forthwith shall turn over to the Receiver title, possession, custody and control of the Property and execute such documents as the Receiver may deem necessary to effect such turnover, including but not limited to a deed or deeds and assignments with respect to any lease or leases; and

(C) the Receiver shall take title, possession, custody and control of the Defendants' Property and, incident thereto, shall, among other things:

(i) pending a sale of Hotel Gorham, take control of the management and operation of said Hotel and all proceeds therefrom and all receivables and other claims thereof, including but not limited to having sole and exclusive

signature authority over all of the Hotel's and/or the Defendants' bank, brokerage and money market accounts; and

(ii) preserve, either in an interest-bearing escrow account or by prudent investment, the excess cash flow, profits and/or retained earnings of the Hotel (the "Preserved Profits") pending a sale of the Hotel; and

(iii) market, prepare for and consummate in due course a commercially reasonable sale of the Hotel in an arm's-length private market transaction; and

(iv) remit to the Plaintiffs the net proceeds of said sale of the Hotel, together with all Preserved Profits, less such commission or compensation as may be due and payable to the Receiver and approved by the Court; and

(v) reimburse Plaintiffs for all fees and expenses paid and to be paid to the Hon. Burton S. Sherman as special fiscal monitor appointed pursuant to this Court's order dated May 25, 2000, and his lawyers and accountants retained in connection with this matter; and

(vi) remit to Defendants attorneys of record, Willkie Farr & Gallagher ("Willkie Farr"), funds from Defendants' bank and brokerage accounts in such amount as in the Receiver's judgment is reasonable and sufficient to compensate Willkie Farr for the billed but unpaid-for legal services it has rendered to Defendants herein through and including the date of entry of this Judgment and Order, provided, however, that the Receiver shall not make any

payment to Willkie Farr in respect of any services rendered in anticipation of or in relation to any appeal from this Judgment and Order or in anticipation of or in relation to any motion to stay enforcement or execution of any portion of this Judgment and Order; and

(vii) continue to make all payments for obligations incurred in the ordinary course of business of the hotel including ordinary and necessary vendor and payroll expenses.

(D) the Receiver, subject to such further approval of the Court as the Receiver deems appropriate after consultation with Plaintiffs, shall:

(i) make all decisions concerning the management and operation of the Hotel, including but not limited to decisions concerning the hiring and firing of Hotel officers and employees and the marketing and sale of the Hotel; and

(ii) retain such hotel property management consultant(s), hotel operator or hotel operating company, real estate broker(s), market consultant(s), lawyer(s), accountant(s) and/or other specialized assistance as in the Receiver's judgment is necessary and appropriate to assist the Receiver in carrying out his duties; and

(iii) pay from the assets of the Hotel the fees and expenses of the Receiver and any parties retained by him pursuant to the immediately preceding subdivision (D)(ii); and

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(iv) pending a sale of the Hotel, retain all Profits and cash balances except for the payment of such expenses as provided for in this Order until such time as Defendants have exhausted all available appeals or until the hotel is sold, and

(E) Pursuant to CPLR 6403, the receiver within 10 business days of the date of this Order shall file an undertaking in the amount of $500,000 and upon such filing, such undertaking shall supercede any undertaking furnished by said receiver in his former capacity as paid fiscal monitor.

ENTER:

Dated: January __, 2001

s/ I. Norman Goodman
J.S.C.

_____
Clerk